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Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
§ (Consolidated)

This Document Relates To:

CLASS ACTION

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT JOSEPH W. SUTTON'S
MOTION TO RECONSIDER HIS MOTION TO DISMISS**

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I. INTRODUCTION

Defendant Joseph W. Sutton's Motion to Reconsider His Motion to Dismiss recycles many of the failed arguments raised in the Certain Officer Defendants' Motion for Reconsideration and Clarification of the Court's Denial of Their Motions to Dismiss. Like the other insider defendants, Mr. Sutton hangs his hopes on a single sentence in the Court's March 25, 2003 Order ("Order"),¹ which mistakenly attributes powers of the Executive Committee of the Board of Directors to the Management Committee, on which Sutton sat. Motion at 3-4. This confusion was, however, "immaterial to the substance of [the Court's] ruling." April 22 Order at 2.

Sutton criticizes the Consolidated Complaint for lacking particularity and for relying on position pleading, accuses the Court of ascribing powers to the Management Committee not pled in the Consolidated Complaint, and objects to being held to different standards than the outside directors. These arguments were rejected in the Court's April 22 Order denying reconsideration.

Defendant's other arguments also are without merit. Sutton first asserts that Lead Plaintiff's decision to sue some but not all members of the Management Committee undermines allegations the Management Committee played a critical role in the Enron fraud. Selection of defendants is irrelevant. Lead Plaintiff is the "master of its complaint," as the Court recognized in rejecting a similar argument from the outside directors.

Sutton next attempts to portray his involvement at Enron as no different than that of defendant Rebecca Mark-Jusbasche, whose motion to dismiss was granted in part. Although the two held similar positions at Enron International, Mark-Jusbasche, unlike Sutton, left Enron International for Azurix *before* the Class Period commenced. See Mark-Jusbasche Order at 4. The two *were not* similarly situated at Enron.

Just as it denied the other insider defendants' motion for reconsideration, and for many of the same reasons, the Court should deny Sutton's Motion to Reconsider His Motion to Dismiss.

¹Order re Enron Insider Defendants Stanley C. Horton, Cindy K. Olson, Lawrence Greg Whalley, Mark A. Frevert, Mark E. Koenig, Steven J. Kean, and Joseph W. Sutton.

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II. THE COURT HAS ALREADY REJECTED SUTTON'S ALLEGED "BEST EVIDENCE"

Sutton asserts that Lead Plaintiff's decision "not even to name numerous persons who served on the Management Committee during the relevant time period as defendants ... belie[s] any argument that service on the Management Committee required each member not only to come face to face with Enron's alleged fraud, but also to participate in that fraud first-hand." Motion at 9. This fact, alleges Sutton, is "perhaps *the best evidence* that the Complaint's Management Committee allegations [alone] do not support an inference" of scienter. *Id.* (emphasis added). Sutton's argument is, in the words of the Court, "weak." *See Order Regarding Enron Outside Director Defendants* at 62 n.32. "Plaintiff is the master of its complaint and may assert or not assert claims against its defendants as it chooses.... The focus is on the adequacy of what Lead Plaintiff does allege, not on what it does not." *Id.* The Court should reject Sutton's argument just as it did when the outside directors raised a similar claim. *See id.*

III. THE ORDER IS CONSISTENT WITH THE DECISION REGARDING DEFENDANT MARK-JUSBASCHE

Sutton claims the Court's Order conflicts with the dismissal of Rebecca Mark-Jusbasche. Motion at 12. Sutton exaggerates any similarities between his and Mark-Jusbasche's tenures with Enron. Unlike Sutton, who was one of the executives "in charge of actually running" Enron and its associated SPEs, the Court found Mark-Jusbasche's duties "centered on operations of a subsidiary or an affiliate." Order at 6; *see Complaint ¶¶88, 395, 397.* Thus, although both defendants served together on the Enron Management Committee, unlike Mark-Jusbasche, Sutton's duties always centered on Enron or Enron International. *See Order at 6; Complaint ¶¶82(n), (r), 88.* And although both served at Enron International, Mark-Jusbasche, in sharp contrast to Sutton, "left Enron International before the Class Period commenced to become CEO of Azurix." *Mark-Jusbasche Order at 4; Complaint ¶¶82(n), (r), 88.*

Sutton also alleges that the timing of his stock trades evidences that the trades were as harmless as Mark-Jusbasche's. Motion at 13 n.6. Sutton ignores a principal reason why the Court found that Mark-Jusbasche's sales did not violate §10(b): "Lead Plaintiff has not alleged any facts

demonstrating fraud at Azurix, no less that Mark-Jusbasche was aware of or severely reckless in disregarding signs of such conduct." Mark-Jusbasche Order at 11.

On the other hand, "[n]ot only does the complaint assert that [Sutton was an insider] involved in the day to day operations of Enron and that all significant business decisions were presented to the Management Committee for the members' approval, and thus essential to effectuating the deceptive scheme, but it is very significant that [Sutton] sat on the key Management Committee for years." April 22 Order at 6. "That fact is important," explains the Court, because

the outstanding feature of the alleged Ponzi scheme was regular, and soon all too predictable, reinforcing patterns of methods effecting the purported deceit and fraud; the very regularity of the scheme, which merely duplicated or imitated again and again the models initially developed in the establishment and funding of Chewo-JEDI-LJM1 and 2, the cumulative structured financing, the recurrent and increasing abuse of mark to market accounting described in such detail in the complaint, the reiterated use of snowballing, the repeated waivers of conflicts of interest regarding Fastow in contravention of Enron's Code of Conduct without any effort of the Committee to check up on the unvarying promised safeguards, the repetitive sham hedging, and the replay of loans disguised as sales. Also critical was the timing of such recurrent contrivances, repeatedly around vital deadlines for SEC reports.

Id. at 6-7. Based on these, and other allegations, the "Court cannot help but find that a strong inference exists of actual knowledge or reckless disregard on the part of [Sutton] arising from Lead Plaintiff's Complaint." *Id.* at 8. The Orders are consistent.²

²Interspersed throughout his motion for reconsideration, Sutton attempts to challenge the factual underpinnings of Lead Plaintiff's allegations. *See, e.g.*, Motion at 8 n.3, 10 nn.4-5, 12. Consideration of Sutton's version of the facts is not appropriate at this time. "In reviewing a motion to dismiss for failure to state a claim, this Court is to accept all factual allegations in the complaint as true and is permitted to draw all reasonable inferences in the plaintiff's" favor. April 22 Order at 3-4.

IV. CONCLUSION

For the reasons above, as well as in the Court's April 22 Order, Defendant Joseph W. Sutton's Motion to Reconsider His Motion to Dismiss should be denied.

DATED: May 6, 2003

Respectfully submitted,

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DECLARATION OF SERVICE BY WEBSITE AND UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on May 6, 2003, declarant served LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT JOSEPH W. SUTTON'S MOTION TO RECONSIDER HIS MOTION TO DISMISS by posting to the website or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's August 7, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of May, 2003, at San Diego, California.

Deborah S. Granger

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SERVICE LIST
May 6, 2003

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